Filed 5/18/12 In re M.C. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re M.C., a Person Coming Under the Juvenile Court Law.	B235888
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. TYRONE C., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK88644)

APPEAL from orders of the Los Angeles County Superior Court. Terry Truong, Referee. Affirmed.

Deborah Dentler, under appointment by the Court of Appeal, for Defendant Appellant.

Office of the County Counsel, John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, and Jacklyn K. Louie, Deputy County Counsel, for Plaintiff and Respondent.

The juvenile dependency court sustained allegations as to Tyrone C. (Father) and his daughter, M.C., pursuant to Welfare and Institutions Code section 300, subdivisions (b) (parental failure to protect) and (d) (parental sexual abuse).[1] Father appeals. We affirm.

FACTS

Father and N.E. (Mother) are the parents of M.C., born in November 2003. Only Father and M.C. are involved in the current appeal. Mother is the also the parent of two other children, S.G., born in January 2000, and N.R., born in September 2007. Mother lives with M.C. and her maternal half siblings, S.G. and N.R., in a home in Palmdale. Father and his girlfriend, L.T., are the parents of two other children, A.C., born in June 1995, and T.C., born in October 2002. Father, L.T., A.C. and T.C. live in a home in Lancaster. Father and Mother have a family law custody agreement concerning M.C.; Mother has full custody of M.C. and Father has visitation rights every other weekend. Despite the family law custody agreement, custody and child support conflicts arose in 2011 between Father and Mother concerning M.C.

In late May 2011, the Los Angeles County Department of Children and Family Services (DCFS) began an investigation of a referral reporting physical abuse by Mother toward M.C. During that investigation, Mother reported that Father had sexually abused M.C.[2] In June 2011, DCFS filed a petition (§ 300) on behalf of M.C.

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1 All section references are to the Welfare and Institutions Code unless otherwise specified.

2 The detention report indicated that there was a history of prior referrals to DCFS, but no prior DCFS cases were ever filed. In 2006, Mother made a report to DCFS that Father had sexually abused S.G. (Mother's oldest daughter). DCFS determined the report was "inconclusive." In 2007, Mother had made a report that Father had sexually abused M.C. That report was determined to be unfounded; when interviewed, M.C. denied the allegation. In 2009, an "anonymous reporter" told DCFS that Mother was using drugs and all three of her daughters were suffering from neglect. DCFS determined the report was "unfounded."

The petition alleged pursuant to section 300, subdivision (b), that M.C. "suffered, or there is a substantial risk that [she] will suffer, serious physical harm" as a result of the failure of her "parent" to protect her adequately. In a supporting statement of facts, the petition alleged that Father "sexually abused" M.C. by repeatedly fondling and digitally penetrating M.C.'s vagina and repeatedly fondling M.C.'s buttocks. The petition further alleged that Mother failed to protect M.C. when Mother knew or should have known of Father's sexual abuse of M.C. Also, that Father's sexual abuse and Mother's failure to protect M.C. from such conduct endangered M.C.'s physical health and safety and placed M.C. at risk of physical harm and sexual abuse. The petition alleged similar facts as to Father pursuant to section 300, subdivision (d).[3]

The dependency court conducted the adjudication hearing on the petition on July 11, 2011. Four witnesses testified: M.C., Mother, Tracy B. (a paternal aunt), and Father. The court admitted DCFS's detention and jurisdiction/disposition reports into evidence. The evidence in the reports and through the in-court testimony is discussed more fully below in addressing Father's claims on appeal.

At the conclusion of the adjudication hearing, the dependency court amended the petition by interlineations to state the following allegations pursuant to section 300, subdivisions (b) and (d):

> "[Father] inappropriately touched [M.C.]'s vagina and buttocks. Such inappropriate touching of [M.C.] by the father place[d] [M.C.] at risk of physical harm."

The court then sustained the allegations as to Father, and Father then filed the appeal that is before us today.

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[3] Originally, the petition alleged further facts pursuant to subdivisions (b) and (d). In this opinion, we focus only on allegations that were sustained by the lower court.

DISCUSSION

I. The Section 350 Issue

Father contends the dependency court's jurisdictional findings must be reversed because the court erred in denying his mid-adjudication motion to dismiss the petition as to him and M.C., for DCFS's failure to meet its burden of proof. (See § 350, subd. (c).) We find no error.

As noted above, the current appeal arises from a petition on M.C.'s behalf alleging various counts pursuant to section 300 as to both her Mother *and* Father, but Mother is not a party to the current appeal.[4] At the adjudication hearing, after M.C. had finished testifying in DCFS's "case-in-chief" on the petition, i.e., as to counts addressed to both Father and Mother, Father moved pursuant to section 350, subdivision (c), to dismiss the dependency proceedings as to him and all three of his children, M.C., A.C. and T.C. (See fn. 3, *ante*.) The court explicitly granted Father's motion to dismiss the dependency proceeding as to him and A.C. and T.C. The court implicitly denied Father's motion as to him and M.C. in that the hearing went forward with further witnesses after A.C. and T.C. departed the courtroom. On appeal, we understand Father to argue that the dependency court should have granted his motion to dismiss the dependency proceeding as to him and M.C. as well.

Section 350, subdivision (c), has been said to be the dependency law's equivalent of a nonsuit in a civil trial. (See *In re Eric H.* (1997) 54 Cal.App.4th 955, 968-969.) The analogy may or may not be wholly apt as the statutory language of section 350, subdivision (c), authorizes the dependency court, "upon weighing all of the evidence," to order "whatever action the law requires." Nonetheless, we are not persuaded by Father's argument that the trial court erred in denying his mid-adjudication motion to dismiss the dependency proceeding as to him and M.C. If Father's motion for dismissal pursuant to

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[4] The record before us on appeal only includes the petition, sustained, that was filed on behalf of M.C. The record suggests that a separate petition may have been filed as to Father's other two children, A.C. and T.C. For purposes of the current appeal, we need not be concerned with any petition other than the petition involving M.C. Our reference to other matters is purely to set the context.

section 350, subdivision (c), is reviewed as a nonsuit-like motion, the dependency court could not grant the motion unless the evidence presented by the "plaintiff," i.e., the party with the burden of proof, here, the social services agency, DCFS, failed as a matter of law to support a finding in its favor. (Cf. *Carson v. Facilities Development Co*. (1984) 36 Cal.3d 830, 838 [wrongful death trial based on negligence].) In deciding whether the plaintiff has presented sufficient evidence to overcome a motion for nonsuit, a trial court may not weigh evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true, and all conflicting evidence must be disregarded. A trial court must give the plaintiff's evidence all the value to which it is legally entitled, indulging all reasonable inferences that may be drawn from the evidence in favor of the plaintiff. (*Id*. at pp. 838-839.) On appeal, a reviewing court is guided by the same rule requiring an evaluation of the evidence in the light most favorable to the plaintiff. (*Ibid*.) If Father's motion to dismiss pursuant to section 350, subdivision (c), contemplated that the dependency court had more latitude in deciding whether to dismiss the dependency proceeding, the standard of review on appeal would undoubtedly be in the vein of abuse of discretion. Under either standard, the trial court's decision to deny Father's motion to dismiss the dependency proceeding as to him and M.C. was proper.

The subdivision (b) allegation

The dependency court properly denied Father's motion to dismiss the petition's allegations pursuant to section 300, subdivision (b), because DCFS's reports contained evidence showing that M.C. told a sheriff's department investigator that Father touched her on her "private parts" almost every time she visited him, and she described a specific incident when she stayed at Father's residence before going on a trip to Disneyland. DCFS's reports also included evidence showing that M.C. relayed substantially similar information to a dependency investigator, and to a detective with the sheriff's department. At the adjudication hearing, M.C. testified that Father had touched her on her private area and on her "behind," that she knew the difference between "good touching" (like a hug) and "bad touching," and that Father's touching had been "bad touching." The evidence was sufficient to overcome Father's motion to dismiss the

allegations that he inappropriately touched M.C. and that his acts placed M.C. at risk of harm.

Father argues DCFS did not prove that M.C. suffered, or that there is a substantial risk that she will suffer, "serious physical harm or illness" as alleged in the petition under section 300, subdivision (b). More specifically, Father argues DCFS did not prove the allegations pursuant to section 300, subdivision (b), because the agency did not present any evidence showing that M.C. had signs or symptoms of any physical injury from any abuse, for example, marks or bruises on her body. Accordingly, argues Father, the dependency court should have dismissed the allegations pursuant to section 300, subdivision (b). The implicit proposition offered is that, even if the court believed Father had touched M.C. in an inappropriate manner, the evidence was not sufficient to sustain the allegation pursuant to section 300, subdivision (b).

We are not persuaded that the dependency court erred in denying Father's motion to dismiss the petition as to the allegations pursuant to section 300, subdivision (b). No cases are cited in support of the proposition that evidence of marks or bruises is required to sustain an allegation pursuant to section 300, subdivision (b). We are satisfied that a reasonable trier of fact could find that a female child is placed at a "substantial risk of suffering serious physical harm or illness" as alleged in the petition when the child is the object of inappropriate sexual touching by an adult male.

Father's reliance on cases such as *In re Daisy H.* (2011) 192 Cal.App.4th 713 do not persuade us to reach a different result. *Daisy H.* cites the statutory requirement that a risk of serious physical harm is required for jurisdiction pursuant to section 300, subdivision (b). The requirement of a risk of serious harm is not disputed in the current case involving Father and M.C., but we do not read *Daisy H.* to support a requirement that there be evidence of bruising or observable marks upon a child for jurisdiction. In *Daisy H.*, the petition alleged that children were placed at risk of serious physical harm as the result of domestic violence between the parents, i.e., the theory for jurisdiction was essentially one of collateral damage from physical violence between the parents. The Court of Appeal did not see evidence to support a finding that such collateral injury

was a true risk. In the case before us today, in contrast, the theory is direct sexual touching by a parent upon a child. We do not understand *Daisy H.* to require a showing that the sexual touching was so rough as to cause bruising or marks on the child's skin.

The subdivision (d) allegation

For the reasons explained above, we also find the dependency court properly denied Father's motion to dismiss the petition as to the allegations pursuant to section 300, subdivision (d). As summarized above, DCFS presented evidence in the form of reports and M.C.'s testimony showing that Father had, in fact, inappropriately touched M.C. on her vagina and buttocks. In this context also, Father's argument does not persuade us that, without evidence of bruising or physical injury, the dependency court erred in denying his motion pursuant to section 350, subdivision (c), to dismiss the section 300, subdivision (d), allegation.

II. The Pleading Issue

Father contends the dependency court's jurisdictional finding pursuant to section 300, subdivision (d), must be reversed in that the petition itself "failed to state a cause of action" under section 300, subdivision (d). We disagree.

Section 300 provides that any child who comes within any of its descriptions is within the jurisdiction of the juvenile dependency court. Section 300, subdivision (d), reads: "the child has been sexually abused or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the Penal Code, by his or her parent . . . ." Penal Code section 11165.1 defines "sexual abuse" to mean "sexual assault" as defined in the section, and Penal Code section 11165.1, subdivision (b)(4), defines sexual assault to include "[t]he intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs, and buttocks) or the clothing covering them, of a child, or of the perpetrator by a child, *for purposes of sexual arousal or gratification* . . . ." (Italics added.) Based on the statutory language, Father argues that a touching of a child's genital area or buttocks is not "sexual abuse" within the meaning of section 300, subdivision (d), unless the parent's touching was done for purposes of sexual arousal or gratification as specified in Penal Code section 11165.1,

subdivision (b)(4). To this point, we are willing to accept Father's argument. (See *In re Mariah T.* (2008) 159 Cal.App.4th 428, 439-440 (*Mariah T.*).)

Building on his statutory interpretation foundation, Father next appears to argue that a fundamentally fatal error was set on track in the current dependency proceeding (we understand his argument to mean a *jurisdictional* defect) because the petition filed by DCFS did not allege that his touching of M.C. was done for purposes of sexual arousal or gratification. Father's argument relies on *Mariah T., supra*, 159 Cal.App.4th at page 439. We do not read *Mariah T.* to support the pleading/jurisdictional argument submitted by Father. The issue in *Mariah T.* was not the sufficiency of a petition's allegations; the issue in *Mariah T.* was whether substantial evidence supported the dependency court's finding of jurisdiction under section 300, subdivision (d). To be specific, whether the evidence showed a mother's live-in boyfriend touched her child with the intent of sexual arousal or gratification. If the boyfriend did not commit "sexual abuse" -- because he did not have intent for sexual arousal or gratification -- then the mother did not fail to protect her child from sexual abuse. The Court of Appeal applied the well-established rule that, because intent is seldom provable by direct evidence, it may be inferred from the factual circumstances of a given incident (citing *People v. Mullens* (2004) 119 Cal.App.4th 648, 662), and found the evidence supported an inferred finding that the boyfriend's touching of the child was accompanied with the intent for sexual arousal. (*Mariah T., supra*, pp. 439-440.)

We are satisfied that the petition in the current case was sufficiently pleaded under the requirements of the dependency law (§ 332), and that it otherwise provided adequate notice to Father of the basis of the dependency proceeding. Father's argument does not convince us that more was required with respect to pleading.

III. Substantial Evidence

Insofar as Father contends the dependency court's jurisdictional findings pursuant to section 300, subdivisions (b) and (d), must be reversed because it is not supported by substantial evidence, we disagree. When a reviewing court is presented with a parent's claim on appeal that a finding by the dependency court is not supported by substantial

evidence, all conflicts in the evidence are resolved in favor of the dependency court's finding. (*In re Katrina C*. (1988) 201 Cal.App.3d 540, 547.) In short, the reviewing court looks only at the evidence that supports the dependency court's finding, and will disregard the evidence that supports a contrary finding. (*In re I.W*. (2009) 180 Cal.App.4th 1517, 1526.) A reviewing court may not substitute its assessment of the credibility of a witness in place of the trial court's assessment of credibility. (*In re Dakota H*. (2005) 132 Cal.App.4th 212, 228.)

Applying the long-established standard of review, we cannot declare the findings in the current case to be unsupported by substantial evidence. M.C. made statements to a number of authorities, including police authorities and a DCFS investigator, that Father had touched her on her vagina and buttocks. At the adjudication hearing, she testified that Father had touched her on her vagina and buttocks. This evidence is sufficient to support the dependency court's findings.

We reject Father's argument that jurisdiction was not established because DCFS's evidence did not prove that Father's inappropriate touching of M.C. caused any harm to M.C. As Father argues -- citing his trial counsel's words at the adjudication hearing -- there was a failure of proof because the evidence did not show a "nexus" between his conduct and any harm suffered by M.C. Father argues the harms exhibited by M.C., if any, were the result of Mother's wrongful behavior, rather than any inappropriate sexual touching on his part. Father's argument strikes us as a request that we reweigh the trial evidence, and come to a different conclusion than that reached by the dependency court. This is not our role as an appellant court. Where, as here, the record on appeal discloses evidence which supports the dependency court's findings, we may not reverse.

Father is correct that the dependency court openly expressed misgivings about the strength of the evidence of wrongdoing in this case in that the court stated its "belief" that M.C. may have been "coached" to accuse Father, and because the court stated that it had

sustained the petition "very reluctantly."[5] We agree with Father that the record shows the court struggled in making its final factual findings. And the court did not sustain the original allegations, but heavily amended language of a lesser character of sexual wrongdoing. In the end, however, the court explained that it was sustaining the petition because it did not see any evidence to counter the general version of events as told by M.C., i.e., that Father inappropriately touched her. Again, Father's argument implicitly asks our court to act as a de novo trier of fact, and reach a different conclusion than did the dependency court, and, again, we reiterate that this is not our role as a reviewing court. We cannot declare that the evidence in the record is not, as a matter of law, " 'reasonable in nature, credible and of solid value.' " (*Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 705.)

To the extent Father appears to argue that the evidence did not show that he harbored the requisite criminal intent when touching M.C. for his actions to constitute sexual abuse within the meaning of the dependency statutes (see *Mariah T.*, *supra*, 159 Cal.App.4th at pp. 439-440), we disagree. Based on the type of activity described by M.C., it was reasonable for the dependency court to infer that Father had a sexual arousal intent when he inappropriately touched M.C.

DISPOSITION

The dependency court's jurisdictional findings are affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J. GRIMES, J.

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5 Father is also correct that the District Attorney declined to prosecute Father for any sex crime. It cannot be doubted that criminal authorities had concerns whether a conviction based upon proof beyond a reasonable doubt could be obtained.